IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 666 of 1993

with

CRIMINAL APPEAL No 746 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GULAMHUSAIN A CHAUDHARY

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 666 of 1993
   MS SM AHUJA for Petitioners No. 1-2,3
   (MR PB MAJMUDAR) for Petitioners No. 1,2,3-4,5-6
   MR MM TIRMIZI for Petitioners No. 1,2,5-6
   MR DP JOSHI, APP for Respondent No. 1
2. Criminal Appeal No. 746 of 1993
   MR DP JOSHI, APP for Petitioner No. 1
   (MR PB MAJMUDAR) for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 16/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. On a trial held by the Ld. Addl. Sessions Judge, Court No.8, Ahmedabad, 8 accused i.e. six appellants in Criminal Appeal No. 666/93 and respondents nos. 3 and 4 in Criminal Appeal No. 746/93 were tried of the offences punishable under Sections 120B, 143,147, 148, 149, 302, 304, 307, 323, 324, 326 and 337 of the Indian Penal Code as well as section 135 of the Bombay Police Act in Sessions Case No. 149/1991. The Ld. Judge has convicted all the appellants in Criminal Appeal No. 666/93 of the offences punishable u/Ss. 147 and 148 of the Indian Penal Code and has further convicted the appellants nos. 3 to 6 of the offence punishable u/S. 326 read with section 149 of the Indian Penal Code whereas the appellants nos. 1 and 2 are convicted of the offence punishable u/S. 302 of the Indian Penal Code and the appellant no. 5 convicted of the offence punishable u/S. 307 of the Indian Penal Code. The Ld. Judge has punished all the appellants with RI for one year and fine of Rs.200/in default RI for 10 days for the offences punishable u/Ss. 147 and 148 of the Indian Penal Code. The appellants nos. 3 to 6 are punished with RI for 5 years and fine of Rs.300/-, in default RI for two months for the offence punishable u/S. 326 read with section 149 of the Indian Penal Code, whereas the appellants nos. 1 and 2 are punished with RI for life and fine of Rs.500/-, in default RI for five months for the offence punishable u/S. 302 of the Indian Penal Code and the appellant no.5 is punished with RI for 5 years and fine of Rs.500/-, in default RI for 3 months for the offence punishable u/S. 307 of the Indian Penal Code. It may be stated that the sentences imposed upon the convicted appellants are ordered to run concurrently. In Criminal Appeal No. 746/1993 the State of Gujarat claims that the appellants nos. 3 to 6 in Criminal Appeal No. 666/1993 and the two acquitted accused i.e. respondents nos. 3 and 4 in Criminal Appeal No. 746/1993 ought to have been convicted of the offences punishable u/Ss. 302, 307 and 326 of the Indian Penal Code with the aid of section 149 of the Indian Penal Code. As common questions of facts and law arise for our consideration in these two appeals,

we propose to dispose them of by this common judgment.

2. One Haji Mahmad Husenbhai is having his tailoring and cloth shop in Devadiwala building and is residing near Saiyed Sahab Baba Dargah in Jamalpur area of Ahmedabad city. He had five sons. Their names were (1) Yunus, (2) Yasin, (3) Yusuf, (4) Faruk and (5) Firoj. Except Firoj all the sons of Haji Mahmad Husenbhai at the relevant time were married. In Jamalpur area there is one Masjid known as Kachni Masjid. One Munnabhai Ghasletwala staying in Devadiwala building was running Vishi in the area and about 40 to 50 persons had become its members. Each member was required to deposit Rs.100/- per month and on the 12th of every month, the amount collected was offered for bid. As per the prevailing practice, the amount collected per month used to be offered to the person who used to give the lowest bid. In the said Vishi son of the complainant Haji Mahmad i.e. Yunus was also a member. On January 12, 1991 at about 8.00 p.m. near Kachni Masjid, the members of the said Vishi had gathered together at the office of Mitra Mandal, where the bid was to take place. The proceedings of the meeting had started and Yunus had offered his bid of Rs.3,000/- in the Vishi. At that time Akbar Abdul Karim, who was also one of the members of the Vishi, had objected against the bid offered by Yunus making grievance that Yunus was taking amount collected during one month on all occasions and had also abused him. In view of the objection raised by Akbar Abdul Karim the meeting was treated as over. Thereafter, Yunus had gone to his father's shop at 9.45 p.m. and informed him that because of the objection raised by Akbar Abdul Karim, he was not given the amount though his bid was lowest and that Akbar Abdul Karim had quarrelled with him. The father of Yunus i.e. complainant Haji Mahmad Husenbhai had, therefore, gone to the residence of Abdul Karim, who is father of Akbar Abdul Karim, but as Abdul Karim was not at his house, he had gone near the office of Mitra Mandal where the convicted appellants and others were standing. The complainant tried to know from Munnabhai, who was managing the affairs of Vishi as to what had happened to the money collected during the course of month. Munnabhai replied Haji Mahmad Husenbhai that his son was taking the amount of bid on every occasion and, therefore, Akbar and his brothers had abused him and that the meeting was dissolved. The complainant had, therefore, asked Gulam Husen Abdul Karim Choudhary as to why he was abusing his son Yunus and thereupon Gulam Husen Abdul Karim had replied that he had not abused his son. At that point of time two sons of the complainant i.e. Firoj and Faruk as well as nephew

of the complainant i.e. Aslam Musabhai had come at the place of incident. As the convicted appellants and others were scolded, they had got agitated and Gulam Husen Abdul Karim i.e. convicted appellant no. 1 in Criminal Appeal No. 666/1993 had caused injury with a knife on the hand of Firoj, whereas Akbar Choudhary i.e. convicted appellant no. 3 in Criminal Appeal No. 666/1993 had caused injuries on left hand fingers of the complainant Haji Mahmadbhai. As the complainant himself and his son were injured, the complainant had asked his sons and nephew to come with him at the police station for lodging complaint against the convicted appellants and others. When the complainant and his relatives had come on the road near his shop, at that time the convicted appellant no. 1 inflicted two knife blows on left side of the chest of Yasin and, therefore, Yasin had fallen down on the ground. Further the convicted appellant no.2 had caused knife injury on waist of another son of the complainant i.e. Firojbhai, as a result of which he had also fallen down. Thereafter, the convicted appellant no. 3 had delivered blow with pipe to Firoj who was trying to get up whereas the convicted appellant no. 4 had given blow with Soda water bottle on the head of Yunus. It is also the case of the prosecution that Akbar Husen i.e. the convicted appellant no. 2 had given knife blow on shoulder of Yunus, whereas the convicted appellant no. 1 had given pipe blow to Yunus and the convicted appellant no. 5 had given knife blow on left side abdomen of Faruk. As per the case of the prosecution, the convicted appellant no. 6 had given one knife blow to Faruk and when Aslam, who is nephew of complainant Haji Mahmad had tried to save Faruk , Akbar Husen i.e. convicted appellant no. 2 had given fist blow on the back of neck of Aslambhai. According to the prosecution, the brothers of appellant no. 2 i.e. the respondent nos. 3 and 4 in Criminal Appeal No. 746/1993, had also come to the place of incident and given kick and fist blows to the injured. Meanwhile, Yasin had profuse bleeding and, therefore, son in law of the complainant had removed him in a rickshaw to V.S. Hospital for treatment. In another rickshaw Aslam, injured Firoj, Faruk , etc. were also removed to V.S. Hospital. During the course of treatment Yasin and Firoj succumbed to their injuries. Therefore, Haji Mahmad Husenbhai had lodged his complaint with Police Inspector, Gaekwad Haveli Police Station, Ahmedabad. In the course of investigation that followed, usual steps for holding inquest, preparing panchnamas of scene of offence, seizure of blood stained clothes were taken and the two dead bodies were sent to the Medical Officer for autopsy. All the injured were also treated. Certain

incriminating weapons were recovered at the instance of some of the accused persons during investigation. On completion of investigation, the police had submitted chargesheet and in usual course the case was committed to the City Sessions Court for trial, where it was numbered as Sessions Case No. 149/1991.

3. The charge at Exh.1 was framed against 8 accused of the offences punishable u/Ss. 147, 148, 302, read with section 149, 307 read with sections 149, 323, 504 read with sec. 149 of the Indian Penal Code as well as section 135 (1) of the Bombay Police Act. The charge was read over to the accused who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Yunusbhai Haji Mahmad P.W.1 Exh. 22 (2) Aslam Musabhai Chhipa P.W.2 Exh. 23, (3) Farookbhai Haji Mahmad P.W.3 Exh. 24, (4) Dr. Madhurikaben Sundarjibhai Panchal P.W. 4 Exh. 25, (5) Bharatkumar Dahyabhai Lauva P.W.5 Exh.28, (6) Haji Mahmad Husenbhai Chhipa P.W. 6 Exh.31, (7) Sifayatulla alias Munnabhai Vahidulla Ghasletwala P.W.7 Exh.32, (8) Dr. Dushyant Chandravadan Dave P.W.8 Exh.33, (9) Himanshubhai Mahendrabhai Acharya P.W.9 Exh.37, (10)Ismailbhai Daudbhai P.W.10 Exh.39, (11) Amanullakhan Hasanbhai Pathan P.W.11 Exh.41, (12) Mahmadumar Abdul Karim P.W.12 Exh. 43, (13) Dr. Jayram Premchand Parmar P.W.13 Exh.45, (14) Aaiyub Abdulbhai Halvawala P.W.14 Exh. 49, (15) Irfankhan Hasankhan Pathan P.W.15 Exh. 51, (16) Gulabnabi Aminbhai P.W.16 Exh. 53, (17) Ahmedbhai Ramjanbhai P.W.17 Exh.55, (18) Makdum Abdul Raheman Shaikh P.W.18 Exh.57 (19) Aaiyubmahmad Sharif P.W.19 Exh. 59 and (20) Baldevsing Kalyansing Kumpavat P.W.20 Exh. 61 to prove its case against the accused. The prosecution also produced documentary evidence such as inquests held on dead bodies of the two deceased, discovery panchnamas prepared u/S. 27 of the Indian Evidence Act, report of the Serologist, post mortem notes of deceased Yasin and deceased Firoj prepared by Dr. Madhurikaben Panchal, injury certificates of injured witnesses, panchnama of place of occurrence, arrest panchnamas of the accused, complaint lodged by complainant Haji Mahmad, etc. in support of its case against the accused. The accused examined Kiritbhai Madhusudan Thakkar as Defence Witness No. 1 at Exh. 67.

4. After recording of prosecution witnesses was over, the Ld. Judge explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure. In their further statements, all the

accused denied the case of the prosecution.

5. On appreciation of evidence led by the prosecution, the Ld. Judge held that it was proved beyond reasonable doubt that deceased Yasin and deceased Firoj had died homicidal deaths. The Ld. Judge referred to the evidence of injured eye witnesses and found that their evidence was reliable as well as trustworthy. The Ld. Judge held that it was not proved by the prosecution that the common object of all the accused was either to commit murder of deceased Yasin or deceased Firoj or to cause injury to Faruk . Placing reliance on the evidence of injured witnesses the Ld. Judge deduced that the appellant no. 1 had caused death of deceased Yasin, whereas the appellant no. 2 had caused the death of deceased Firoj and that both the appellants were liable to be convicted of the offence punishable u/S. 302 of the Indian Penal Code. The Ld. Judge further held that commission of offences by all the convicted accused u/S. 147 and 148 of the Indian Penal Code was established by the prosecution and that it was proved by the prosecution that the convicted appellants nos. 3 to 6 had committed offence punishable u/S. 326 read with sec. 149 of the Indian Penal Code. Further the Ld. Judge deduced that it was proved by the prosecution that the appellant no. 5 had committed offence punishable u/S. 307 of the Indian Penal Code. The Ld. Judge noticed that no cogent and reliable evidence was adduced by the prosecution that any offence was committed by respondents nos. 3 and 4 in Criminal Appeal No. 746/1993. In view of the above referred to conclusions, the Ld. Judge has convicted the appellants in Criminal Appeal No. 666/1993 and imposed punishment referred to earlier; whereas the Ld. Judge has acquitted the respondents nos. 3 and 4 in Criminal Appeal No. 746/1993, giving rise to the present two appeals.

6. Mr. M.M. Tirmizi, learned counsel for the convicted appellants as well as respondents in acquittal appeal, submitted that the prosecution has not examined independent witnesses in this case and, therefore, interested version of the incident as given by the prosecution witnesses should be disbelieved by the Court. The learned counsel submitted that it is not satisfactorily proved by the prosecution that the convicted appellants as well as the respondents in acquittal appeal had knowledge that murders were likely to be committed by some of the convicted appellants and, as common object as mentioned in section 149 of the Indian Penal Code does not stand established, each accused should be held liable for his own act and the

appeal should be accepted. According to the learned counsel for the accused, the evidence of the prosecution witnesses establishes that a sudden quarrel had taken place between the accused on one hand and complainant and his relatives on the other and, therefore, section 149 of the Indian Penal Code would not be attracted to the facts of the present case. The learned counsel for the accused pleaded that the appellant no. 2 had not taken undue advantage at all and he having inflicted only one blow to deceased Firoj, the offence committed by him would be punishable under Part-I of Section 304 of the Indian Penal Code and as he has undergone imprisonment of 12 years by this time, the imprisonment undergone should be imposed on him for the commission of the offence punishable u/S. 304 Part-I of the Indian Penal Code. The learned counsel pointed out that the convicted appellant no. 3 had caused, according to the prosecution, injuries on fingers of complainant Haji Mahmadbhai, but complainant Haji Mahmadbhai has sustained only minor injuries and was not even admitted in the hospital for treatment and as the appellant no. 3 had not caused injury to any one else, his conviction should be altered to one u/S. 323 of the Indian Penal Code. The learned counsel argued that though it is the case of the prosecution that the convicted appellant no. 3 had caused injury to deceased Firoj by means of a pipe, no contused lacerated wound was found on the person of Firoj when his post mortem examination was carried out and, therefore, the convicted appellant no. 3 would be liable only for causing injury to the complainant Haji Mahmadbhai. Further it was claimed that the appellant no. 4 is alleged to have caused injury to injured Yunus with a Sola water bottle and pipe as well as injury to Aslam, but the evidence on record establishes that injured Yunus was discharged on 3rd day of his admission in the hospital; whereas injured Aslam was discharged within a day from the hospital and thus appellant no. 4 having not caused any grievous hurt to any one, his conviction is liable to be altered to one u/S. 324 of the Indian Penal Code. According to the learned counsel for the accused, the appellant no. 5 had caused one knife injury on abdomen of injured Farukbhai, but as his intention was not to cause murder of Farukbhai, his conviction of the offence punishable u/S. 307 should be altered to one u/S. 326 of the Indian Penal Code. It was also claimed that the appellant no. 6 is alleged to have caused one knife blow on hand of Faruk, which was not found to be serious at all and, therefore, the conviction of the said appellant of the offence punishable u/S. 326 of the Indian Penal Code should be altered to one punishable u/S. 324 of the Indian Penal

Code. The learned counsel for the convicted appellants submitted that appellant no. 3 should be convicted u/S. 323 of the Indian Penal Code and as he has undergone imprisonment of about 31 months, no further punishment should be imposed on him, whereas as the appellant no. 4 and appellant no. 6 have undergone imprisonment of 5 months, the punishment of imprisonment already undergone should be imposed on them for having committed the offence punishable u/S. 324 of the Indian Penal Code. The learned counsel further pointed out that the convicted accused no. 7 whose conviction deserves to be altered to one u/S. 326 of the Indian Penal Code, has already undergone imprisonment of 5 months and, therefore, for the said offence he should be punished with imprisonment already undergone because of lapse of time between his conviction and the date on which the appeal is taken up for final hearing. The learned counsel lastly pleaded that the reasons given by the Ld. Judge for convicting the convicted appellants of the major offences are contrary to the evidence adduced by the prosecution and the appeal filed by the convicted appellants should be accepted. So far as acquittal appeal is concerned, the learned counsel emphasized that no case is made out by the prosecution for application of provisions of section 149 of the Indian Penal Code to the facts of the present case and as respondents nos. 3 and 4 in the acquittal appeal were merely present at the place of incident, their acquittal being well founded, should be confirmed by the Court.

7. Mr. D.P. Joshi, Ld. APP contended that the common object of the convicted appellants as well as acquitted respondents in acquittal appeal was to cause the murder of the deceased as well as to cause grievous hurt and attempt to murder Faruk and, therefore, the common object having been established, all the accused ought to have been convicted u/S. 302 with the aid of section 149 of the Indian Penal Code. According to the Ld. APP, the evidence of the prosecution witnesses is not only consistent, trustworthy and cogent, but is also supported by medical evidence on record and, therefore, the prosecution case cannot be thrown overboard as claimed by the learned counsel for the accused on the ground that independent witnesses have not been examined in this case. What was highlighted by the learned counsel was that the appellant no. 2 had caused injury to deceased Firoj with a dangerous weapon on vital part of the body and, therefore, conviction of the said appellant of the offence punishable u/S. 302 of the Indian Penal Code being just, should be upheld. The learned counsel further submitted that the appellant no.

5 had caused injury by knife blow on abdomen of injured Faruk, who was required to be operated and whose injury was found to be of grievous nature by the doctor and, therefore, his conviction of the offence punishable u/S. 307 of the Indian Penal Code should also be upheld by the Court. Further according to the Ld. APP, rest of the convicted appellants had caused different injuries to injured witnesses by means of weapons like pipe, Soda water bottle, etc. and, therefore, their conviction of the offences punishable u/S. 326 read with section 149 of the Indian Penal Code should be maintained by the Court. The learned counsel lastly pleaded that there is no merits in the conviction appeal and, therefore, the same should be dismissed; whereas acquittal appeal filed by the State Government should be accepted by the Court, as common object contemplated by section 149 of the Indian Penal Code is successfully established by the prosecution.

8. We have considered the arguments advanced at the bar and reappreciated the whole evidence on record. The evidence of injured Yunus Haji Mahmad P.W. 1 is recorded at Exh.22. His evidence indicates that since childhood he was residing near Saiyedbabani Dargah situated in Jamalpur area of Ahmedabad city. According to him, he was residing with his brothers, parents and wife. The witness has stated that in his locality a Vishi was being run in the name and style of Unity Mitra Mandal and that he was one of the members of the said Vishi. According to this witness, he had enrolled 21 members and that each member was required to deposit a sum of Rs.100/- per month and draw of the Vishi amount collected was taking place on 12th of next month. The witness has informed the Court that on January 12, 1991 monthly draw was arranged in the office of Unity Mitra Mandal and that he had offered lowest bid regarding amount collected, but Akbar and Gulamhusen had objected and they had quarrelled with him. According to this witness because of the objection taken by Akbar and Gulamhusen, the meeting was dissolved and he was not given the amount collected during the month and that he had, therefore, informed about the same to his father Haji Mahmad. The witness has stated that thereafter his father had gone to the house of father of Akbar, but as father of Akbar was not available, his father had gone to the office of Unity Mitra Mandal, where Gulamhusen, Sadikhusen and Akbar Chaudhary were standing and that they were scolded by his father. According to this witness, he was following his father and had also come near the office of Unity Mitra Mandal and his brother Firoj had also come there and that Gulamhusen i.e.the convicted appellant no. 1 had given

blow with knife on the hand of his brother Firoj. What is claimed by this witness is that at that time Akbar Abdul Rajak i.e. the convicted appellant no. 3 had tried to cause injury to his cousin Aslam Musabhai and when his father had tried to save Aslam, his father had received injury on his left hand finger. The witness has further stated that thereupon his father had suggested to file criminal complaint against Gulamhusen Chaudhary and others and when they were passing on the road, the appellant no. 1 had inflicted knife blows on the neck and chest of his brother Yasin, as a result of which, his brother had fallen down. The witness has further stated that thereafter the appellant no. 2 had caused knife injury on the waist of his brother Firoj, as a result of which he had also fallen down and that Akbar Chaudhary i.e. the appellant no. 3 had caused injury to his brother Firoj by means of a pipe. According to this witness, the appellant no. 4 had caused injury on his head by hitting a Soda water bottle, whereas the appellant no. 2 had caused injury with knife on his shoulder and that the appellant no. 4 had also caused injury to him. The witness has asserted that when his brother Faruk had tried to rescue him, accused Balamkhan i.e. the appellant no. 5 had caused injury on abdomen of his brother Faruk and that appellant no. 6 i.e. Shermahmadkhan had caused injury by means of knife on the hand of his brother Faruk. Further this witness has claimed in his evidence that at that time his cousin Aslam had tried to intervene in the incident and that the appellant no. 2 had given him a fist blow and had also caused injury on his neck by means of knife. The witness has claimed that the appellant no. 4 had also caused injury by means of pipe to his cousin Aslam. The witness has further stated that at that time the respondents nos. 3 and 4 in the acquittal appeal had given kick and fist blows to him and his brothers. According to this witness, Yasin was profusely bleeding and, therefore, he was removed to Vadilal Sarabhai Hospital in a rickshaw and that in another rickshaw other injured persons were removed to V.S. Hospital. The witness has deposed that his two brothers i.e. Yasin and Firoj had succumbed to their injuries during the course of treatment and that his police statement was recorded on January 13, 1991. We may state that this witness was cross-examined on behalf of the prosecution, but nothing substantial could be elicited so as to cast doubt about the version of incident as given by him in his examination-in-chief. No major contradictions with his earlier statement are brought on the record during the course of his cross-examination. Further the evidence of this witness stands amply corroborated by evidence of other eye

witnesses as well as medical evidence on record. The witness himself was injured in the incidient and, therefore, his presence at the place and time of incident is hardly in doubt. He being the real brother of the two deceased, would not allow the real culprits to go scot-free and involve the appellants falsely in such a serious case. Having regard to the totality of the facts and circumstances of the case, we are satisfied that the testimony of witness Yunus Haji Mahmad is consistent, cogent as well as reliable and, therefore, the Ld. Judge of the trial Court did not commit any error in placing reliance on his testimony. We may state that similar account of the incident in question is narrated by injured Aslam Musabhai Chhipa P.W.2 Exh.23, injured Faruk Haji Mahmad P.W.3 Exh.24 and injured complainant Haji Mahmad Husenbhai Chhipa P.W. 6 Exh.31. As they have given the same version of the incident as is narrated by witness Yunus, we do not think it necessary to repeat the same and burden the judgment unnecessarily. However, we notice that all the witnesses have given consistent account of the incident and are supported by medical evidence on record. No major contradictions in their evidence having been brought on the record of the case, we are of the opinion that the Ld. Judge rightly relied upon their evidence for the purpose of believing the prosecution case in part.

9. This brings us to the question as to whether common object as contemplated by Section 149 of the Indian Penal Code is established by the prosecution or not. It is relevant to notice that at the time of dissolution of the meeting it was not intended by any of the accused to cause any injury to Yunusbhai and, therefore, it is difficult to attribute any common object to the accused at the time when the meeting was dissolved. Further none of the accused knew that Yunusbhai would go to his father and complain about non-payment of Vishi amount to him nor had any of them any inclination that the father of injured Yunus would come to the office of Unity Mitra Mandal and scold the three convicted appellants. Under the circumstances, it is difficult to conclude that injury was caused to deceased Firoj and complainant Haji Mahmadbhai in furtherance of common object of the accused. Further the evidence of prosecution witnesses establishes that when Firoj was caused injury on his hand and when the complainant had sustained injuries on his fingers while trying to save Aslam, at that time it was suggested by the complainant that they should go to the police station for lodging complaint and, therefore, the common object of all the accused was to prevent the complainant and

others from going to the police station and lodging a complaint against them. At that time it is alleged that different injuries were caused by different accused as is narrated by the witnesses in their substantive evidence before the Court. Section 149 of the Indian Penal Code creates vicarious liability and provides inter-alia that if an offence is committed by any member of an unlawful assembly in prosecution of common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. While considering the applicability of section 149 of the Indian Penal Code, it is not necessary for the prosecution" to attribute overt act to each accused. However, it is not the intention of the legislature in enacting section 149 to render every member of an unlawful assembly liable to punishment of every offence committed by one or more of its members. In order to invoke section 149 it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly, it must be within knowledge of other members as one likely to be committed in prosecution of the common object. It is well settled that a mere innocent presence in an assembly of persons, as for example, a by stander does not make the accused a member of unlawful assembly unless it is shown by direct or circumstantial evidence that the accused had shared the common object of the assembly. Further in a case of sudden fight between the two parties, there can hardly be question of invoking the aid of section 149 for the purpose of imposing constructive criminal liability on an accused and the accused in such a case can be convicted only for the injury caused by him for his individual act. In Tanaji Govind v/s. State of Maharashtra AIR 1988 SC 174 two murders had taken place and several persons were injured. After noticing the facts of the case, the Supreme Court has interpreted section 149 of the Indian Penal Code to mean that if a sudden unpremeditated fight takes place between two groups, the members thereof cannot be said to have formed an unlawful assembly within the meaning of section 149 and in such a case each of them would be liable for their individual acts and not for the acts of others. Applying the principle laid down by the Supreme Court in the above referred to decision, to the facts of the present case, we find that the common object of the accused was to prevent the complainant and his sons from going to the police station for the purpose of lodging complaint and that the common object was never

to cause the deaths of the deceased. However, in furtherance of this common object, the convicted appellants nos. 1 and 2 acted beyond the common object of the unlawful assembly and, therefore, they will be liable for their individual acts, but others cannot be constructively held liable for the acts of those appellants who had acted beyond the common object of unlawful assembly. Therefore, it will have to be ascertained as to each accused has committed which offence.

10. The fact that deceased Yasinbhai and deceased Firoj had died homicidal death is not in dispute. This fact stands amply proved by the evidence of Dr. Madhurikaben Sundarjibhai Panchal P.W.4 Exh.25. Her evidence establishes that on January 13, 1991 the dead body of Yasin Haji Mahmad was brought before her for post mortem examination and that she had carried out post mortem examination on the dead body of the deceased. Her evidence would further show that on examination she had noticed four external injuries and one internal injury which was corresponding to external injury no.1. According to her, the external injury no. 1 sustained by the deceased was possible by a sharp cutting instrument like knife and that the external injury no. 1 by itself was sufficient in the ordinary course of nature to cause the death of the deceased. The doctor has specifically stated that though the external injury no. 2 by itself was not sufficient to cause death of the deceased, but it was sufficient in the ordinary course of nature to cause death if the same is taken into consideration with the external injury no.1. The evidence of Dr. Madhurikaben stands amply corroborated by post mortem notes of the deceased, which are produced on the record of the case at Exh. 26. The cause of death of the deceased as mentioned in the post mortem notes is shock following extensive intra thoracic haemorrhage due to injury to vital vessels.

11. The evidence of Dr. Madhurikaben further shows that dead body of deceased Firoj was also brought before her for post mortem examination and that she had conducted post mortem examination on the dead body of Firoj also. On examination, the doctor had found two external injuries and one internal injury which was corresponding to external injury no.2. The doctor has stated in her testimony that the injuries sustained by the deceased were possible by a sharp cutting instrument like knife and that the external injury no.2 was sufficient in the ordinary course of nature to cause the death of the deceased. In the case of deceased Firoj

also the doctor has produced post mortem notes at Exh. 27 and as per the post mortem notes, the cause of death of deceased Firoj was shock following putra - abdominal haemorrhage due to vital injury to vital vessel. Further the injuries sustained by deceased Yasin and deceased Firoj are also noted in detail in the inquest panchnama which is produced on the record of the case at Exh. 13. Having regard to the facts and circumstances of the case, we are of the opinion that the prosecution has successfully proved that deceased Yasin and deceased Firoj had died homicidal deaths. Thus, the finding recorded by the Ld. Judge regarding homicidal death of deceased Yasin and deceased Firoj being eminently just, is hereby upheld.

12. The evidence of the injured eye witnesses examined in the case establishes that the appellant no. 1 had caused two injuries to deceased Yasinbhai. Both the injuries were caused on vital part of the body. Dr. Madhurikaben, who had performed autopsy on the dead body of Yasin, has specifically stated that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death. It is not the case of the appellant no. 1 that the injuries which were found on deceased Yasinbhai were accidental nor it is the case of appellant no. 1 that blows were aimed on some other parts of the body of the deceased and that because of supervening cause like sudden intervention of some one or movement of the deceased, the knife had struck the vital part of the body of the deceased. It was the intention of the appellant no. 1 to cause those very injuries which were found during the course of post mortem examination. As observed earlier, the medical evidence establishes that the injuries were sufficient in the ordinary course of nature to cause death and, therefore, in our view the offence committed by the appellant no. 1 would be one punishable u/S. 302 of the Indian Penal Code.

13. The case of the prosecution is that the appellant no. 2 had caused injury on right side abdomen of deceased Firoj and caused his death. The evidence of prosecution witnesses establishes that the appellant no. 2 had caused only one injury by knife on right side of abdomen of deceased Firoj. As observed earlier, no one had any inclination that witness Yunusbhai would go to his father and that his father would come to the office of Unity Mitra Mandal for the purpose of scolding the accused. Thus, there is no manner of doubt that all of a sudden the quarrel had taken place, more particularly after the father of witness Yunusbhai had decided to go

to the police station for the purpose of lodging complaint. It is not the case of the prosecution that the appellant no. 2 had tried to take any undue advantage of the situation and inflicted another blow on deceased Firoj. Further no reliable evidence is led by the prosecution to prove that the appellant no. 2 had intended to inflict that particular injury, which was ultimately found to have been inflicted and which ultimately proved to be fatal. As observed earlier, there was sudden quarrel and fight had ensued. For the above reasons, we are of the opinion that the conviction of the appellant no. 2 of the offence punishable u/S. 302 of the Indian Penal Code is not well founded. It can safely be said that the appellant no. 2 had committed culpable homicide not amounting to murder, but he had caused such bodily injury as was likely to cause death and, therefore, the offence committed by him would be one punishable under Part-I of Section 304 of the Indian Penal Code. The record of the case further shows that the appellant no. 2 has actually undergone imprisonment of 12 years and, therefore, we are of the opinion that the interest of justice would be served if the imprisonment already undergone by him is imposed on him for commission of the offence punishable u/S. 304 Part-I of the Indian Penal Code.

14. The case against the convicted appellant no. 3 is that he had caused injury on left hand fingers of complainant Haji Mahmad Husenbhai by inflicting pipe blow. Admittedly Haji Mahmad Husenbhai was not admitted in the hospital as an indoor patient. The injury certificate of complainant Haji Mahmad which is on the record of the case, establishes that he had suffered minor injuries. Though it was the case of the prosecution that the appellant no. 3 had caused injury to deceased Firoj by giving pipe blows, the same does not stand corroborated by medical evidence. The medical evidence of Dr. Madhurikaben does not show that deceased Firoj had sustained any contused lacerated wound which could have been caused by means of pipe blows. However, there is no reason to disbelieve the evidence of injured Haji Mahmad Chhipa to the effect that he had sustained injuries on his fingers when pipe blow was given to him by appellant no.3. His evidence regarding injury to him is not only corroborated by medical evidence on record, but also by the evidence of other eye witnesses. Therefore, the appellant no. 3 will be liable to be convicted of the offence punishable u/S. 324 of the Indian Penal Code. The record of the case shows that the appellant no. 3 has undergone imprisonment of about 31 months, which by any standard is more than sufficient for

the offence punishable u/S. 324 of the Indian Penal Code. Therefore, we are of the opinion that interest of justice would be served if the appellant no. 3 is punished with imprisonment which he has already undergone for the offence punishable u/S. 324 of the Indian Penal Code and no further punishment deserves to be imposed on him for the commission of said offence.

15. The case of the prosecution against the appellant no. 4 is that he had used pipe as well as Soda water bottle and caused injury on the head of Yunus. It is also the case of the prosecution that he had caused injury to witness Aslam Musabhai. However, the medical evidence on record shows that injured Yunus was admitted in the hospital on January 12, 1991 and discharged on January 15, 1991. So far as injured Aslam is concerned, it is established from the record of the case that he was discharged from the hospital within a day. Having regard to the nature of injuries mentioned in the certificates issued in respect of injured Yunus and injured Aslam, it is difficult to conclude that the intention of appellant no. 4 was to cause grievous hurt either to Yunus or to Aslam and, therefore, the appellant no. 4 would be liable to be convicted of the offence punishable u/S. 324 of the Indian Penal Code. The record of the case shows that the appellant no. 4 has undergone imprisonment of five months by this time. We may state that at the time of admitting Criminal Appeal No. 666/93 for final hearing, the Division Bench comprising V.H. Bhairavia and B.J. Shethna, JJ, by order dated June 28, 1993 had refused bail to the appellant no. 4, but subsequently appellant no. 4 had moved Criminal Misc. Application No. 5660/1993 in Criminal Appeal No. 666/1993 and prayed for bail. The Division Bench comprising of N.J. Pandya and D.G. Karia, JJ, by order dated November 5, 1993 had enlarged the appellant no. 4 on bail. It is not reported by the prosecution that the appellant no. 4 who was enlarged on bail during the pendency and final hearing of the appeal, has misused the liberty granted to him by the Court. Nothing adverse has been reported against him. Further the incident had taken place on January 12, 1991, whereas the appeal filed by the convicted appellants is taken up for final disposal on October 16, 2001, that is after a lapse of about 10 years. Having regard to the totality of facts and circumstances of the case, we are of the opinion that interest of justice would be served if the appellant no. 4 is punished with imprisonment which he has already undergone while holding that he has committed offence punishable u/S. 324 of the Indian Penal Code.

16. So far as the case against appellant no. 5 is concerned, we find that case against him is quite different than the one placed against the appellants nos. 3 and 4. The prosecution case is that he had inflicted knife blow on the abdomen of Faruk. Injured Faruk Haji Mahmad P.W.3 Exh.24 in his substantive evidence before the Court has specifically stated that the appellant no. 5 had caused injury with knife on his abdomen. The evidence of Dr. Jayram Premchand Parmar P.W. 13 Exh.45, who had treated injured Faruk, clearly establishes that Faruk Haji Mahmad was admitted in the hospital on January 12, 1991 and was discharged from hospital on January 29, 1991. According to Dr. Parmar, injured Faruk had sustained incised wound having the size of 3 cm. x 1 cm. x 2 cm and praetorium was visible. The doctor has stated that the injury sustained by injured Faruk was possible by sharp cutting instrument like a knife. The evidence of Dr. Parmar further shows that the injured was operated upon. During cross-examination by the defence the doctor has specifically asserted that it was not possible for him to say whether the injury sustained by the injured could have or could not have caused his death, but the injury sustained by injured Faruk was serious and the whole stomach was required to be opened while performing the operation. Having regard to the nature of medical evidence on record, we are of the opinion that the appellant no. 5 would be liable to be convicted of the offence punishable u/S. 326 of the Indian penal Code, because he had caused such an injury which had endangered life of injured Faruk and his case would be squarely covered within Clause eighthly of section 320 of the Indian Penal Code. We may mention that the appellant no. 5 is convicted by the Ld. Judge of the trial Court of the offence punishable u/S. 307 of the Indian penal Code and punished with RI for 5 years and fine of Rs.500/-, in default RI for 3 months. The evidence on record shows that injured Faruk was not armed at all. The severity of the blow speaks for itself. The damage done has its own story to tell. Had the operation not been performed, probably the injured would have sustained some permanent impairment. It is from that angle the guilt of the appellant no. 5 needs to be viewed rather than the result. The evidence of Dr. Parmar shows that the injuries sustained by Faruk could have caused his death. Therefore, we are of the opinion that though the conviction of the appellant no. 5 is liable to be altered from one u/S. 307 of the Indian Penal Code to Section 326 of the Indian Penal Code, the punishment imposed on the appellant no. 5 is just and deserves to be upheld.

17. As far as case against the appellant no. 6 is concerned, we find that he is convicted by the Ld. Judge of the offence punishable u/S. 326 of the Indian Penal Code. The case of the prosecution is that he had inflicted knife blow on the hand of injured Faruk. Dr. Parmar, who had examined injured Faruk, has stated in his substantive evidence before the Court that while treating injured Faruk he had found cut wound extending from shoulder upto the elbow and that the said wound was superficial. There is no manner of doubt that the appellant no. 6 had caused injury to Faruk by means of a dangerous weapon like knife. The evidence of injured Faruk that the appellant no. 6 had caused injury on his hands by means of knife stands amply corroborated by the evidence of other eye witnesses also and, therefore, the just conviction of the appellant no. 6 for causing injury on the hand of injured Faruk by means of knife will have to be upheld. However, the case of the appellant no. 6 does not fall within any of the clauses of section 320 and, therefore, in our view his conviction of the offence punishable u/S. 326 of the Indian Penal Code is not justified. Having regard to the facts of the case, we are of the opinion that the appellant no. 6 would be liable to be convicted of the offence punishable u/S. 324 of the Indian Penal Code. The record of the case shows that he was in imprisonment for a period of 5 months during the course of investigation and trial and pendency of appeal. Though initially prayer for bail made by him was rejected by the Division bench vide order dated June 28, 1993, the appellant no. 6 had moved Criminal Misc. Application No. 5393 of 1993 for bail and the same was accepted by another Division Bench vide order dated October 27, 1993. As observed earlier, the incident in question had taken place on January 12, 1991, whereas the appeal is being heard after a period of about 10 years and, therefore, we are of the opinion that interest of justice would be served if the appellant no. 6 is punished with imprisonment which he has already undergone while holding that he has committed offence punishable u/S. 324 of the Indian Penal Code.

18. As far as acquittal of the respondents nos. 3 and 4 in Criminal Appeal No. 746/1993 is concerned, we find that no cogent evidence has been led by the prosecution to establish that they had actually participated in commission of crime by other accused or that they had committed any overt act. We have already held that provisions of Section 149 of the Indian Penal Code do not apply to the facts of the present case and, therefore, they cannot be saddled with constructive liability for commission of offences by other accused.

Further the allegation against the acquitted accused was that they had given kick and fist blows to injured Yunus and others. However, the claim of injured Yunus and others is not supported by medical evidence on record. Having regard to the totality of the facts and circumstances of the case, we are of the opinion that benefit of doubt granted by the Ld. Judge of the trial Court, who had advantage of observing demeanor of the witnesses cannot be said to be erroneous in any manner so as to warrant our interference in the acquittal appeal. It is well settled that if two views are possible, then the appellate Court would not interfere with the order of acquittal recorded by the trial Court. The reasons given by the Ld. Judge of the trial Court for giving benefit of doubt are cogent as well as convincing and we concur with the same. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the Ld. Judge for acquitting respondents nos. 3 and 4 in Criminal Appeal No. 746/1993 and, therefore, their acquittal deserves to be upheld. As held by us earlier, no case is made out by the Ld. Addl. Public Prosecutor for invoking provisions of Section 149 of the Indian Penal Code to the facts of the present case and, therefore, the rest of the respondents in Criminal Appeal No. 746/1993 cannot be convicted of major offences with the aid of section 149 of the Indian Penal Code. The acquittal appeal, therefore, is required to be dismissed.

19. For the foregoing reasons, Criminal Appeal No. 666/1993 succeeds in part. The conviction of the appellant no. 1 of the offence punishable u/S. 302 of the Indian Penal Code is hereby confirmed. We are of the opinion that the Ld. Judge of the trial Court was justified in punishing him with RI for life and fine of Rs.500/-, in default RI for 5 months for the offence punishable u/S. 302 of the Indian Penal Code. Therefore, punishment imposed on the appellant no. 1 is also hereby confirmed.

So far as the appellant no. 2 is concerned, his conviction of the offence punishable u/S. 302 of the Indian Penal Code is altered to one under Part-I of Section 304 of the Indian Penal Code and he is punished with imprisonment which he has already undergone. As the appellant no. 2 has undergone the punishment imposed on him for the commission of offence punishable u/S. 304 Part-I of the Indian Penal Code, the jail authorities are directed to release him immediately unless his presence is needed with reference to any other case.

The conviction of the appellant no. 3 of the offence punishable u/S. 326 of the Indian Penal Code is altered to one u/S. 324 of the Indian Penal Code. As observed earlier, he has already undergone imprisonment for more than 30 months and no case is made out by the prosecution to impose any further punishment on him. Therefore, the appellant no. 3 is punished with imprisonment which he has already undergone while holding that he has committed offence punishable u/S. 324 of the Indian Penal Code. As the appellant no. 3 has undergone punishment imposed on him for commission of the offence punishable u/S. 324 of the Indian Penal Code, he need not be taken into custody, because he is on bail.

So far as the appellant no. 4 is concerned, the conviction of the appellant no. 4 of the offence punishable u/S. 326 of the Indian Penal Code is altered from Section 326 to Section 324 of the Indian Penal Code and he is punished with imprisonment which he has already undergone. As the appellant no. 4 has undergone the punishment imposed on him for the commission of offence punishable u/S. 324 of the Indian Penal Code, he need not be taken into custody again, because no further punishment is imposed by this Court.

The conviction of the appellant no. 5 of the offence punishable u/S. 307 of the Indian Penal Code is altered to one punishable u/S. 326 of the Indian Penal Code and he is punished with RI for 5 years and fine of Rs.500/-, in default RI for 3 months. As the appellant no. 5 is on bail and has not undergone the sentence confirmed by this Court, he is directed to surrender to the authorities within three weeks from today.

The conviction of the appellant no. 6 of the offence punishable u/S. 326 of the Indian penal Code is altered to one punishable u/S. 324 of the Indian Penal Code and he is punished with imprisonment which he has already undergone. The record of the case shows that appellant no. 6 is on bail and as the appellant no. 6 has undergone the punishment imposed on him for the commission of offence punishable u/S. 324 of the Indian Penal Code, he need not be taken into custody again because no further punishment is imposed by this Court, while holding that he has committed offence punishable u/S. 324 of the Indian Penal Code.

The acquittal of respondents nos. 3 and 4 in Criminal Appeal No. 746/1993 is hereby upheld and not interferred with. Criminal Appeal No. 666/1993 accordingly is partly allowed; whereas Criminal Appeal

No. 746/1993 is dismissed.

The Muddamal to be disposed in terms of the directions given by the Ld. Judge of the trial Court in the impugned judgment.

[J.M. PANCHAL, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.